CTAP CASELAW UPDATES[1] – JANUARY 2008

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Planning, Zoning and Subdivision Law

Flathead Citizens for Quality Growth v. Flathead Co. Board of Adjustment (Montana Supreme Court, 2008 MT 1, on appeal from the District Court of the Eleventh Judicial District of Montana, January 3, 2008)

Summary:

(1) When a growth policy has been implemented through zoning regulations, the statements and policies contained in the growth policy acquire legal force, and to the extent they relate to zoning they must be complied with in addition to the zoning regulations.

(2) When a state agency has authority over a particular resource impacted by a proposed land use, the local government must make specific findings of fact as to how state approval will mitigate the impacts of the development; a condition simply requiring the applicant obtain state approval is not sufficient.

(3) Section 82-4-432(2)(c), MCA, requires that a local government find a proposed mining operation consistent with local Part 2 zoning regulations before the open cut mine permit can be issued by the state.

(4) Section 76-2-209, MCA "does not require a zone be denominated solely residential" for local governments to be able to prohibit gravel pit operations. Rather, the regulations must be evaluated on a case-by-case basis to determine if the primary purpose of the regulations is to promote and regulate residential use.

Petitioner community group challenged a decision by the Flathead County Board of Adjustment to issue a Conditional Use Permit (CUP) for a gravel pit, including extracting and crushing gravel on a 320-acre parcel of land in the West Valley Zoning District. The zoning district had been created to implement the West Valley Neighborhood Plan, which described the area as "primarily for silvicultural and agricultural uses," with a suburban development pattern. The Plan stated that "industrial uses should not be permitted except those accessory to normal farm operations," but "gravel extraction," while not defined, was listed as a conditional use in

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the district's zoning regulations. However, the same regulations defined "extractive industries" as "commercial or industrial operations involving the removal and processing of sand, rock, soil, gravel, or any mineral," and such operations were not permitted nor conditionally permitted in the district. The zoning regulations specifically provided that in the event of a conflict with the Plan, the more restrictive provisions of either would control.

The Board granted the CUP for gravel extraction only, finding that the proposed asphalt and concrete batch operations were not permitted in the zoning district. The Board determined that the zoning district was "residential," thereby allowing the Board to prohibit some of the operations proposed under the CUP. (§ 76-2-209, MCA.) The Board imposed numerous conditions on the CUP, requiring the applicant obtain DEQ approval and provide signs and limit hours of operations on the surrounding roads. The Board also disregarded the requirement in the zoning regulations that the applicant for an open cut mining permit from the state obtain that permit before the CUP could be issued, since state law requires the local agency to find the proposal consistent with local zoning regulations before the state agency can approve the permit.

The community group appealed the decision, arguing that: (1) the more restrictive language in the Plan, regarding prohibition of industrial operations, controlled over the more permissive zoning regulations; (2) the zoning regulations precluded extractive industries in the district; (3) the Board failed to address the adverse impacts of the gravel operation on area roads and water quality; and (4) the CUP approval violated their right to a clean and healthful environment. The applicant intervened in the appeal, claiming that the Board was preempted from denying or limiting the CUP per state statute. (§ 76-2-209(2) and (3), MCA.) The district court granted summary judgment for the Board, finding the Board correctly determined the district was a residential area and adequately addressed the impacts of the operation.

The Montana Supreme Court held that Section 76-1-605(2) "does not prohibit the enforcement of growth policies in all circumstances but simply states that a growth policy or master plan only acquires legal force by virtue of another law or regulation." Here, zoning regulations were enacted that gave legal force to the Plan, and those regulations provided that the more restrictive provisions of either document would apply. The Plan stated that only industrial uses accessory to normal farm operations were permitted. The Court held that because this statement specifically related to the zoning of the district, and the applicant had made no showing that the proposed gravel operation was "accessory to normal farm operations," the CUP was unlawfully approved. Further, the Board failed to make any findings on whether "gravel extraction" and "extractive industries" were synonymous, or what the definition of "gravel extraction" was with respect to issuing the CUP. Citing *North 93 Neighbors v. Bd. Of Co. Commissioners of Flathead County*, 2006 MT 132, 332 Mont. 327, 137 P.3d 557, the Court emphasized the importance of developing an adequate administrative record and remanded the case to the District Court to allow the Board to develop adequate findings and conclusions to support its decision.

The Court also found that the Board abused its discretion in issuing the CUP, since it did not make findings as to the impacts the proposed operation would have on substandard roads or water quality in the area. The zoning regulations specifically provided that the burden fell on the applicant to show its proposal would be in compliance with the regulations, but the evidence in the record did not demonstrate this burden had been met. While some of the conditions on the CUP addressed the operation's use of surrounding roads by requiring signage and limiting hours of operations, none of those conditions addressed the increased use of existing substandard roads. With respect to water quality, the Court held that the Board's condition that the applicant obtain Department of Environmental Quality (DEQ) approval for its operations was not sufficient to address water quality impacts. While the Court acknowledged that DEQ approval may be adequate to protect water quality, it is incumbent on the Board to make factual findings that such approval is adequate to address the water quality concerns raised during the public hearings.

The Court held that Section 82-4-432(2)(c), MCA, requires that the Board approve the CUP before the open cut mine permit can be issued by the state. Although the zoning regulations required that the state permit be obtained before the CUP be issued, the Court held that the Board could not ignore the local zoning regulations in order to allow the applicant to proceed with state approval. The local government must revise the regulations in order to follow state statute, or vice versa; the Court refused to revise the regulations *sua sponte* to ameliorate this dilemma.

Finally, the Court examined the statutory limitations contained in § 76-2-209(2) and (3), MCA, on a local government's ability to condition or prohibit gravel pit operations. Under these statutory provisions, a local government agency may condition or prohibit gravel pit operations located within a site that is zoned residential, but may only condition (but not prohibit) such operations in all other zones. The applicant argued that the regulations did not specifically zone the West Valley Area "residential," and therefore the Board could not prohibit the crushing and batching operations proposed for the site. The Court held that § 76-2-209 "does not require a zone be denominated solely 'Residential' for…" for local governments to be able to prohibit gravel pit operations. Since the purpose, text, and maps of both the Plan and the zoning regulations was to promote and regulate residential use within the unique context of the West Valley area, the Court held the area met the standard necessary to meet the definition of "residential" within the meaning of § 76-2-209.[2]

[2] On February 7, 2008, the Flathead County Commissioners amended the County zoning ordinance to clarify that land zoned AG-40 and AG-80 is not primarily residential; the change will prohibit the County from denying gravel pits operations in those zones.

Cokedale, LLC v. Park County (District Court of the Sixth Judicial District of Montana, January 10, 2008)

Summary: Under Part 1 zoning regulations, Planning and Zoning Commissions can only regulate uses, types of buildings, and the open space around buildings. Denial of a proposed development pattern due to substandard area roads is outside the scope of the commission's statutory authority.

A plaintiff landowner petitioned for the creation of a "Part 1" zoning district, and the County approved the petition and created the district. No use or design regulations were adopted by the County as part of the approval of the district. Thereafter, the plaintiff submitted a development pattern as contemplated in Section 76-2-104, MCA, and filed a declaration of condominium, in what appeared to be an attempt to fit into the condominium exemption from subdivision review. (*See* former Section 76-3-203, MCA (2005), providing that "condominiums constructed on land divided in compliance with this chapter are exempt from the provisions of this chapter if … (2) the condominium proposal is in conformance with applicable local zoning regulations where local zoning regulations are in effect.) The County denied the proposed development pattern, on the grounds that the roads were not to the standards necessary to protect public health, safety, and general welfare. The plaintiff sued the County, arguing such issues were not within the authority of the Planning and Zoning Commission under Part 1 zoning regulations.

Judge Swandal granted the plaintiff's motion for summary judgment, noting that a Planning and Zoning Commission, under the auspices of Part 1 zoning, can only regulate: 1) the uses carried on in an area; 2) the types of buildings that may be erected or altered; and 3) the open space around the buildings. (*See* Section 76-2-104(2), MCA, and *City of Missoula v. Missoula County*, 139 Mont. 256 (1961).) The denial of a proposed Part 1 development pattern due to substandard roads is outside the scope of authority granted to Planning and Zoning Commissions under Part 1 zoning.

Big Sky Development Group, LLC v. Ravalli County Clerk and Recorder (District Court of the Twenty-First Judicial District of Montana, January 25, 2008)

Summary:

(1) The definition of "condominium unit" under Unit Ownership Act and the MSPA means multiple-unit buildings, and does not include stand-alone, single family units or buildings;

(2) The second condominium exemption in the MSPA relating to compliance with zoning (§ 76-3-202(2)) applies only when zoning has been adopted, and not merely in the absence of zoning;

(3) Condominium proposals are subject to local review for evasion of the MSPA and local subdivision regulations under the local agency's general powers and duty to evaluate proposals for evasion of the MSPA; and

(4) Single-family condominium units that can become separate, single-family homes upon removal from the Unit Ownership Act, absent local regulation or variance allowing for such units, constitute de facto *subdivision plats.*

After Ravalli County passed an interim zoning ordinance limiting subdivision density in the County to a minimum of one dwelling unit per two acres, plaintiffs sought to record declarations for four different condominium developments under the Unit Ownership Act and exempt from subdivision review per the condominium exemption from the Montana Subdivision and Platting Act (MSPA) (§ 76-3-203(2), MCA (2005)). Three of the four condominium proposals consisted entirely of numerous single-family dwelling "units" to be sold individually but located on existing parcels proposed to be owned in "common" by the members of the condominium; the fourth plan proposed 17 multi-family unit buildings to be located on two parcels.

The County refused to record the declarations, alleging that the projects were an attempt to evade the requirements of the MSPA and that the condominiums as proposed were not exempt under the condominium exemption of the MSPA. The plaintiffs filed for a writ of mandate ordering the County to file the declarations; the parties stipulated to file preliminary declarations pending trial on the merits of plaintiff's lawsuit. The parties then filed cross motions for summary judgment. Plaintiffs sought judgment that: 1) the term "condominium unit" under Unit Ownership Act and the MSPA applies to a stand-alone, single family residence; 2) their proposals were exempt from subdivision review per the condominium exemption in the MSPA; and 3) their proposals are not subject to County review for evasion of the MSPA and the County's subdivision regulations. The County sought judgment that: 1) its process for reviewing proposed condominium developments for evasion of the MSPA and the County's subdivisions regulations is valid; and 2) stand-alone, single family residences that can be removed from the Unit Ownership Act constitute *de facto* subdivision plats.

Judge Haynes ruled against the plaintiffs on all of their claims. Following the rules of statutory construction, and absent a local regulation or variance that allows single-family detached condominiums, the definition of "building" in the Unit Ownership Act means *multiple units* in either a single building or in multiple buildings, each of which includes one or more rooms occupying one or more floors. (§ 70-23-102(2) and (14), MCA.) The *dicta* in *Boland v. City of Great Falls* provides no authority for the proposition that condominiums, under Montana law, may consist of single-family detached buildings.

Judge Haynes also ruled that the second condominium exemption from the pre-2007 version of the MSPA – exempting condominiums "in conformance with applicable zoning regulations where local zoning regulations are in effect" from subdivision review – did not apply to the plaintiffs' proposals. The history of that provision reveals that the legislature intended this exemption to apply only where zoning already exists; not merely in the absence of zoning, as argued by plaintiffs. The holding in *Shults v. Liberty Cov*e does not support the argument that the exemption allows condominiums to proceed without subdivision review in the absence of zoning; the question in that case was whether the land at issue had been previously divided in compliance with the MSPA when the prior division had been specifically exempted from review. The lack of zoning does not equate to a specific statutory exemption from subdivision review.

The district court rejected the plaintiffs' claim that the County could not subject the condominium proposals to the County's subdivision evasion review criteria. The plaintiffs' argued that the local evasion review provided for in the MSPA relates only to the exemptions set forth in Sections 76-3-201 and 76-3-207, MCA. (*See* § 76-3-504(1)(p), MCA.) Local agencies must develop local subdivision regulations that meet the minimum requirements of the MSPA and do not conflict with the MSPA. The Montana Supreme Court has acknowledged that local agencies have "a duty to evaluate and determine from all the circumstances whether the proposed division of land is based on a purpose to evade the subdivision requirements." (*See Hampton v. Lewis & Clark County*, 2001 MT 81, ¶ 47 (Mont. 2001); *State ex rel. Leach v. Visser* (1989), 234 Mont. 438; 40 Mont. Op. Atty. Gen. No. 16 (1983).) Therefore, the County as a local agency has the authority to review condominium proposals for evasion from the MSPA. However, the Court refused to decide whether Ravalli County's particular process for reviewing proposed condominium developments for evasion of the MSPA and the County's subdivisions regulations is valid, as that process had not yet taken place for the plaintiffs' proposals and the record was therefore undeveloped for review.

Finally, the district court ruled that single family condominium units that can become single family homes upon removal from the Unit Ownership Act, absent local regulation or variance allowing for such units, constitute de facto subdivision plats that must be reviewed and approved pursuant to the MSPA and local subdivision regulations. The court ruled that the three of the four proposals for condominium units submitted by plaintiffs' consisting entirely of numerous single-family dwelling "units" were *de facto* subdivision plats.

Constitutional Law

Matsuda v. City & County of Honolulu (9th Circ., on appeal from the United States District Court for Hawaii, January 14, 2008)

Summary: While a city is barred by the reserved powers doctrine of the Contracts Clause from contracting away its power of eminent domain, it may not act to "substantially impair an existing contractual relationship" between itself and a third party obligating the city to use its best efforts acquire property under certain circumstances.

The City of Honolulu passed an ordinance obligating it to exercise its power of eminent domain upon petition by a required number of condominium lessees. Upon receipt of a petition, the City would enter into a contract requiring it and the lessees to use their best efforts to effectuate the acquisition. If the petition met certain public health, safety, and welfare criteria, the city would acquire the property and transferring each unit to the current lessee. Plaintiffs, holders of condominium leases in the City, petitioned for such an action and the City entered into a contract with the lessees obligating it to use its best efforts to accomplish the acquisition of Plaintiff's condominiums. Prior to the city's final determination of whether the petition met the stated criteria, however, the City repealed the ordinance and refused to move forward with the acquisition. Plaintiffs sued for violations of the Contract Clause and due process, and sought damages under §1983.

The district court granted summary judgment for the City on all three claims, finding that the repeal of the ordinance did not violate the Contracts Clause, as the contracts purported to limit the city's discretion over the use of its eminent domain power and were therefore void *ab initio* by the "reserved powers doctrine" (a state may not enter a contract that surrenders an essential attribute of its sovereignty). The appellate court overturned that decision, holding that the lower court failed to use the higher standard of review to be applied "when a state's action interferes with its own contractual obligations" set forth in *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977). While the city could not contract away its power to use eminent domain, here the city reneged on its contractual obligation to use its best efforts to effectuate an acquisition of their leased property – an action not barred by the reserved powers doctrine.

The appellate court remanded the case to the district court to evaluate the Contracts Clause claim under *U.S. Trust*, examining whether the challenged action "operated as a substantial impairment of a contractual relationship."

Environmental Law

Bering Strait Citizens for Resp. Resource Dev. v. U.S. Army Corps (9th Circ., on appeal from the United States District Court for Alaska, January 3, 2008)

Summary: Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) were adequate and sufficient for review of Section 404 permits issued by the Army Corps of Engineers for two open-pit gold mines in Alaska. In Ninth Circuit, no absolute requirement that an EA be circulated for public review; rather, the agency must be able to demonstrate that it provided the public with sufficient environmental information.

Plaintiff citizens group alleged the Corps violated the Clean Water Act and the National Environmental Policy Act (NEPA) when it issued a Section 404 permit to the Alaska Gold Company for two open-pit gold mines involving the filling of almost 350 acres of wetlands. The mines were historically mined, and contained debris and tailings from earlier mining activities. The Corps issued an EA and FONSI for the proposed project. The Corps required removal of stockpiles from existing wetlands, the reclamation of previously disturbed wetlands, use of historic waste rock for improvements to the mine roads, removal of tailings from the adjacent creek flood plain, and the conversion of mining pits to pit lakes. The agency also incorporated conditions proposed by the EPA and the USFWS. The Corps concluded the mitigation measures would result in a net loss of approximately 170 acres of wetlands but simultaneously accomplish environmental improvement of the degraded mining sites.

The district court denied the plaintiff's motion for a temporary restraining order and preliminary injunction, and granted the defendant's motion for summary judgment. The plaintiffs appealed, and the appellate court affirmed the decision. The Corps extensively and properly considered 24 alternatives to the design of the mines and determined that the alternatives were not practicable, as required by the Clean Water Act. (*See* 40 C.F.R. § 230.10(a).) The Corps also properly considered the significant economic benefits to result from the mines in evaluating the public interest in issuing the Section 404 permit. (*See* 33

C.F.R. § 320.4(b)(4).) The Corps also properly considered the "persistence and permanence of the effects" of the proposed mines, determining that the impacts would be localized or limited in time. (*See* 40 C.F.R. § 230.10(c).) The Corps is also not required to undertake a separate analysis of a proposal's compliance with Section 401 of the Clean Water Act, as a state's certificate of compliance with Section 401 is conclusive with respect to water quality considerations. The Corps included all "appropriate and practicable" mitigation measures in issuing the permit, accepting all concrete conditions proposed by the EPA, and fully developed the required mitigation plan for the mines even though some mitigation included plans to development additional mitigation measures in the future. (*See* 40 C.F.R. § 230.10(d).)

The 9th Circuit also held for the first time that NEPA does not require that an EA be circulated for public review. Instead, "an agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process." Depending on the circumstances of each case, the agency may be able to provide adequate information to the public through public meetings or scoping, or may need to circulate the EA. Here the Corps conducted extensive public outreach, including running a weekly newspaper column, conducting local presentations, and radio interviews, and received and responded to a high level of public comment, the record demonstrated that the agency had provided the public with adequate environmental information and did not violate NEPA by not circulating the EA. Further, the EA's succinct discussion of cumulative impacts was adequate, when there were no projects proposed of similar magnitude, and the plaintiffs could not identify any past, present, or reasonably foreseeable future projects for cumulative impact consideration. The Corps consideration of 24 alternatives to the design of the mines demonstrated a comprehensive, search, and rational assessment of alternatives, the mitigation measures were developed to a reasonable degree, and adequately considered the impacts of the mines on air quality, water quality, and biological resources. Finally, the Corps was not required to prepare an EIS, as no significant questions of were raised as to whether the project would degrade the environment.

Felman v. Bomar (9th Circ., on appeal from the United States District Court for the Central District of California, January 10, 2008)

Summary: Ninth Circuit rules that when plaintiffs delay in filing lawsuit and fail to obtain an injunction against an activity alleged to be done without adequate environmental review, the court may not ultimately reach the merits of their case if the claims are mooted by the intervening completion of the project and no remedy exists for the alleged harm.

The Nature Conservancy (TNC) and the National Park Service (NPS) instituted a feral pig eradication program as part of a four-pronged plan to restore and protect Santa Cruz Island preserve, part of Channel Island National Park. The pigs were destroying endangered vegetation, causing erosion, damaging archeological artifacts, and attracting non-native prey species to the island. (Side note – I spent two weeks on this island in 1992 studying bird and plant species, and these pigs were frightening! Very "lord of the flies"!)

The NPS issued a draft Environmental Impact Statement for the program, and plaintiff animal rights organization submitted comments opposing the pig eradication program. The organization urged the NPS to adopt instead a non-lethal solution to the pig program. The NPS responded to these comments, explaining that such methods were impractical. The NPS adopted a final EIS for the eradication program, and began to implement the program.

Two years later, the organization filed suit for various violations of the National Environmental Policy Act and its state counterpart in California (there is no statute of limitations on a NEPA claim). The district court denied its request for a preliminary injunction, a ruling affirmed by the Court of Appeal. Before oral argument on the merits of the case, NPS moved to dismiss the appeal as moot, as the feral pig population had been eradicated from the island during the pendency of the proceedings. The district court granted the motion, and the decision was affirmed by the Court of Appeal. The appellate court emphasized the continued harm posed to the natural resources of the island by the pigs – supporting the NPS' rush to complete the program – and plaintiff's two year delay in filing suit, allowing most of the alleged harm to occur in the meantime. Because there was no remedy available to relief the harm already suffered by the organization (the lethal eradication of the pigs), the case was moot.